The Malayan Law Journal

1977

BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

PRIVY COUNCIL REPORT

GOVERNMENT OF MALAYSIA v. IZNAN BIN OSMAN

[P.C. (Viscount Dilhorne, Lord Hailsham of Saint Marylebone, Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel) March 22, 1977]

[Privy Council Appeal No. 11 of 1976]

Administrative Law — Dismissal of police constable by Chief Police Officer — Purported delegation of powers by Police Force Commission — No delegation of power to appoint — Dismissal by Chief Police Officer void and of no effect — Federal Constitution, Articles 135(1), 140, 144 and 162.

Constitutional Law — Public Services — Police Constable — Restriction on dismissal — Federal Constitution, Articles 135(1), 140, 144 and 162.

Practice and Procedure — Appeal — New point sought to be argued on appeal — Amendment to Federal Constitution — Retrospective operation — Federal Constitution, Article 140.

This was an appeal from the decision of the Federal Court reported at [1975] 2 M.L.J. 61. The respondent, a police constable, had been convicted of the offence of permitting his car to be used as a public service vehicle without a licence and after his conviction he was informed that his dismissal was contemplated and he was told that if he wished to make representations he should do so in writing to the Chief Police Officer. The respondent sent in a letter submitting his representations but the Chief Police Officer, purporting to act under the powers conferred on him as per the 1st Schedule to the Police Force Ordinance, 1952, decided to dismiss him. The Police Force Commission had purported to delegate its powers under Article 140(1) of the Federal Constitution to the Chief Police Officer. The respondent applied for a declaration that his dismissal was void and inoperative and that he was still a member of the Police Force. The High Court held that the dismissal by the Chief Police Officer was null and void and inoperative and this was confirmed by the Federal Court. The appellant appealed to the Yang Dipertuan Agung and on the hearing of the appeal before the Privy Council it was sought to present a new argument based upon the amendment to Article 140 by the Constitution (Amendment) Act, 1976 (Act A 354).

Held, dismissing the appeal: (1) the provisions of the Commissioner's Standing Order and of Schedule 1 to the Police Force Ordinance, 1952, which authorised the dismissal of a constable by a Commanding Officer was not in accord with the Federal Constitution prohibiting dismissal of a member of the police force by an authority subordinate to that which had power to appoint him and as the respondent was dismissed by the Commanding Officer, his dismissal was void;

(2) the Commanding Officer had no power under the Police Force Ordinance to appoint a police constable, and therefore the purported delegation by the Police Force Commission of its functions under Article 140(1) of the Federal Constitution was ineffective to delegate the power of appointment of a constable to the Chief Police Officer and therefore, the Chief Police Officer having no power to appoint could not dismiss the respondent;

(3) it would not be proper in this case to entertain the new argument based on the amendment to the Federal Constitution as the respondent had not been given adequate opportunity to meet it.

PRIVY COUNCIL FROM MALAYSIA.

D.H. Farquharson Q.C. (*Nicholas Lyell* with him) for the appellant.

G.T. Rajan for the respondent.

Lord Fraser of Tullybelton (delivering the judgment of the Board): This is an appeal from the judgment of the Federal Court of Malaysia, dismissing an appeal from an Order made by Sharma J. which declared that the purported dismissal of the respondent (plaintiff) from the Royal Malaysian Police Force was null and void and that the respondent was entitled to all arrears of salary from the date of his purported dismissal, April 19, 1967.

The facts are not in dispute. On June 1, 1961 the respondent was appointed a police constable by the Commandant of the Federal Police Depot, Kuala Lumpur. On April 19, 1967 he was convicted by the Magistrate's Court at Ipoh of permitting his motor car to be used as a public service vehicle without a licence authorising such use and without being covered by a policy of insurance in respect of third party risks, contrary to two sections of the Road Traffic Ordinance, 1958. He was fined $1000. On April 22, 1967 the Chief Police Officer, Perak wrote to the respondent informing him that in consequence of his conviction he was suspended from duty without pay with effect from April 19, 1967, until such time as his appeal against conviction was decided. The respondent appealed against conviction but his appeal was dismissed and thereafter on September 7, 1967 the Chief Police Officer wrote and informed him that his dismissal from the service was contemplated on the ground that he had been convicted in the Magistrate's Court and that any representations he wished to make should be submitted and addressed to the Chief Police Officer within fourteen days. On September 19, 1967 the respondent submitted representations. By a letter dated November 11, 1967 (hereinafter referred to as "the letter of dismissal") the Chief Police Officer acknowledged receipt of the representations and wrote to say that he had decided to dismiss the respondent with effect from April 19, 1967. He informed the respondent that he might appeal to the Commissioner of the Royal Malaysia Police within ten days. The respondent did appeal to the Commissioner on November 20 and on February 29, 1968 a reply from Police Headquarters

at Kuala Lumpur informed him that the appeal had been considered by the Inspector-General himself who had decided not to interfere with the decision made by the Chief Police Officer, Perak and that the decision of dismissal was final.

It will be convenient here to quote the operative paragraphs in the letter of dismissal. These are:

"2. After having regard to all the facts concerned regarding the incident I have decided to dismiss you from the Police Service with effect from April 19, 1967 in accordance with the powers conferred on me as per the 1st Schedule to the Police Ordinance, 1952.

3. Please note that you may appeal to the Commissioner Royal Malaysia Police, Kuala Lumpur regarding this dismissal within 10 days from the date of this order (notice) *i.e.* from November 10, 1967 in accordance with section 15(2) of the Police Regulations 1952."

At the time of the respondent's appointment to the Police Service in 1961 the legislation regulating that service consisted of the Police Ordinance, 1952 and Regulations and Standing Orders made respectively under sections 81 and 82 of the Ordinance. Section 9 of the Ordinance made provision for the appointment of Police Officers and Constables of various ranks and sub-section (3) provided as follows:

"(3) A constable may be appointed....
by the Commissioner...."

(The appointment of the respondent bears to have been made by the Commandant of the Federal Police Depot, who is of course an officer of lower rank than the Commissioner and the appointment may therefore have been irregular. This was mentioned by counsel for the appellant but he did not found any argument on such possible irregularity and his submissions were presented on the basis that the respondent had been properly appointed as a Police Constable. Their Lordships will also proceed on that basis).

Section 45(1) of the Ordinance provides that any Police Officer or Constable who is found guilty by an Officer authorised in that behalf of any offence against discipline shall, subject to Police Regulations, be liable to such punishment as is set out in the First Schedule to the Ordinance. The First Schedule sets out a table of punishments which may be awarded to Police Officers of various ranks and to Constables and the authorities who may award them. The provision which applied to the respondent is that dismissal may be awarded to a Constable by a Commanding Officer. "Commanding Officer" is defined by section 2 of the Ordinance as including the Commissioner and various Officers of lower rank including a Chief Police Officer.

The dismissal of the respondent by the Chief Police Officer, Perak was therefore in accordance with the provisions of this Schedule, as stated at the end of paragraph 2 of the letter of dismissal. But the Chief Police Officer appears to have overlooked the fact that the Ordinance, including the Schedule, had been repealed by the Police Act, 1967 (No. 41 of 1967); see section 98 and Third Schedule of the Act. The Police Act, 1967 came into force on August 29, 1967, that is, before the respondent had been dismissed (on November 11, 1967). The fact that the Act came into force after his suspension (April 19, 1967) appears to their Lordships to be immaterial. But although the Ordinance itself was repealed, a proviso to section 98 of the Act of 1967 provided that any Rules, Regulations or Orders made under the Ordinance were to remain in force so long as they were not in conflict with the provisions of the Act. The effect of that proviso was to save *inter alia* the Police Regulations, 1952 and the Commissioner's Standing Order, neither of which so far as material to this appeal was inconsistent with the Act of 1967. The Police Regulations, 1952 have no relevance to the present case except that paragraph 15(2) of the Regulations was referred to in error in paragraph 3 of the letter of dismissal. These regulations laid down a code of procedure for bringing and hearing disciplinary charges against Police Officers and Constables by their superior Officers, and Regulation 15 provided for a right of appeal against conviction in respect of a disciplinary offence in certain cases. But the proceedings which led to the dismissal of the respondent were not taken under the Police Regulations, 1952 at all. They were under the Commissioner's Standing Order Part A205 (which, of course, was also preserved by the proviso to section 98 of the 1967 Act) and which applied in the case of a Constable who had been convicted of a criminal charge by a (civilian) criminal court. Paragraph 9 of the Standing Order provided that in such a case the Commanding Officer after warning the Constable that his dismissal was contemplated and inviting representations from the Constable might order that he be dismissed or otherwise punished without any of the disciplinary proceedings prescribed in section 45 of the Police Ordinance, 1952 and Part I of the Police Regulations, 1952. There is no provision for any right of appeal to the Commissioner. The procedure laid down in the Standing Order was duly followed out in the respondent's case except that he was accorded a right of appeal to which he was not strictly entitled. But as he cannot have been prejudiced in any way by having been allowed to appeal and having his appeal dismissed the matter is of no importance.

The position therefore is that the respondent was dismissed by the Chief Police Officer, Perak, who was his Commanding Officer (see Police Ordinance, 1952, section 2) and who would have been entitled to dismiss him if the Standing Order had stood alone. But the Constitution of Malaysia had come into force on Merdeka Day (August 31, 1957) and thereafter was the supreme law of the Federation — see Article 4. It imposes a restriction on dismissal and reduction in rank of members of certain public services including the Police Force. The restriction is imposed by Article 135 which is in the following terms:

"(1) No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 [which include the Police Service] shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank."

In addition to Article 135(1) the other Articles most directly material to this appeal are Article 140(1) and (6), Article 144(1) and (6) and Article 162(1) and (6). These are as follows:

"140. *Police Force Commission.*

(1) There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the police force and which, subject to the provisions of any

existing law, shall be responsible for the appointment,... and exercise of disciplinary control over members of the police force.

....

(6) The Police Force Commission may provide for all or any of the following matters: ....

(b) the duties and responsibilities of the several members of the Commission, including the delegation to any member of the Commission or the police force or board of officers of such force of its powers or duties; ....

"144. *Functions of Service Commissions.*

(1) Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint,... and exercise disciplinary control over members of the service or services to which its jurisdiction extends.

....

(6) A Commission to which this Part applies may delegate to any officer in a service to which its jurisdiction extends, or to any board of such officers appointed by it, any of its functions under Clause (1) in respect of any grade of service, and that officer or board shall exercise those functions under the direction and the control of the Commission."

"162. *Existing laws.*

(1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by Federal or State Law.

....

(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

The effect of Article 140(1) and 144(1) is that after Merdeka Day the only authority which has power to appoint Police Constables was the Police Service Commission, later the Police Force Commission, subject no doubt to its powers to delegate its functions. Clearly therefore the provisions of the Commissioner's Standing Order, and of Schedule 1 to the Police Ordinance, 1952 so long as it was in force, which authorised the dismissal of a Constable by a Commanding Officer were not in accord with the provisions of Article 135(1) of the Constitution prohibiting dismissal of a member of the Police Force by an Authority subordinate to that which had power to appoint him. The Standing Order must, therefore, in accordance with Article 162(6) be applied with such modifications as will bring it into accord with the Constitution. But no modification of it can confer power on a Chief Police Officer to appoint a Constable. Consequently no modification of it can give him power to dismiss one. As the respondent was dismissed by the Commanding Officer, his dismissal is therefore void unless there is some other basis on which its validity can be justified.

On April 9, 1962 the Police Force Commission made a delegation of its functions in the following terms:

"In accordance with Article 140(6)(b) of the Federal Constitution, the Police Force Commission hereby delegates its functions under Article 140(1) in respect of members of the Police Force... to the Commissioner of Police and to other police officers or boards of police officers so as to be exercised as specified in the Police Ordinance, 1952, and in the rules, regulations and standing orders made or purporting to have been made thereunder."

Were it not that this delegation of powers is limited to the exercise of powers specified in the Police Ordinance and the Rules, Regulations and Standing Orders, it would be possible to contend that the Police Force Commission had delegated to a Chief Police Officer power to appoint a Constable. But as the Police Ordinance and the Rules, Regulations and Standing Orders do not give any such power of appointment, the power of appointment having been vested by section 9(3) of the Ordinance in the Commissioner, it cannot be contended that a Commanding Officer, who is subordinate to the Commissioner, had by virtue of the Standing Order any power of dismissal of a Constable after the Constitution came into force. The same objection applies to a subsequent delegation on September 16, 1963, and the respondent's dismissal was therefore void and of no effect.

Mr. Farquharson who appeared for the appellant and made his submissions with complete candour, conceded that that was the position. But he argued that the delegation did not divest the Police Force Commission of all its powers under the Constitution and that the Commission itself retained power to dismiss a Constable notwithstanding the delegation. Their Lordships are willing to regard, at least for present purposes, the argument so far as correct. The next step in Mr. Farquaharson's argument was that when the Chief Police Officer dismissed the respondent on November 11, 1967 he was acting not under the Commissioner's Standing Order nor under the delegation of April 9, 1962 but on behalf of the Police Force Commission by virtue of its powers under Articles 140 and 144 of which it had not divested itself. Their Lordships are quite unable to accept this argument, having regard to the terms of the letter of dismissal and to the absence of any indication there or in any other document to which their attention was called that the Chief Police Officer was acting on the instructions of the Commission. In paragraph 2 of the letter of dismissal the Chief Officer of Police referred clearly to the decision to dismiss as his own ("I have decided to dismiss you") and he stated that he was acting "in accordance with the powers conferred on me as per the 1st Schedule to the Police Ordinance, 1952". In the face of that letter it is not possible to hold that the Chief Police Officer was merely acting as the agent or on the instructions of the Commission and passing on a decision made by the Commission. This argument therefore fails and in their Lordships' opinion the dismissal was therefore void.

There is one final matter to which their Lordships must refer. Mr. Farquharson sought leave to present an entirely new argument based upon the Constitution (Amendment) Act, 1976 (Act A354) which came into force on August 26, 1976. This argument is nowhere stated or even adumbrated in the appellant's printed case, and no formal notice had been given to the respondent's advisors or to the officials of this Board that leave to present the argument would be sought, although a period of more than five months had elapsed since the Amendment Act came into force. Their Lordships were informed by Mr. Farquharson, and

they of course accept, that informal notice had been given to the respondent's advisors a few days before the hearing but Mr. Rajan explained that he personally had first heard of the matter when he arrived in London about three days before the hearing. Mr. Rajan objected to the argument being presented without proper notice and without having been formulated in writing.

Their Lordships are of opinion that it would not be proper for them to entertain the new argument in this case. No proper notice of it has been given to the respondent, and the respondent's counsel has had no opportunity to consider it and, if necessary, to take instructions upon it. At the very least an adjournment for those purposes would have been required and no Motion for such an adjournment was made on behalf of the appellant. Their Lordships understand that the new argument would have been based upon provisions in the Constitution (Amendment) Act, 1976 which purport to take effect retrospectively and thus to deprive the respondent of a vested right which has already been affirmed by the High Court and by the Federal Court in these proceedings. This attempt to deprive a litigant of a right of property by retrospective legislation passed *pendente lite* is a step of a most unusual character; and that makes it all the more necessary that the respondent should have had an adequate opportunity of meeting the argument, before their Lordships could consider it.

For these reasons their Lordships will advise the Yang Dipertuan Agung that the appeal should be dismissed and that the appellant should bear the cost of the appeal.

Appeal dismissed.

Solicitors: *Stephenson, Harwood & Tatham; Philip Conway Thomas & Co.*

SINGAPORE REPORTS

TOMLINSON ANTIQUE HOUSE v. LIM MENG WAN & ANOR.

[O.C.J. (Rajah J.) February 11, 1977]
[Singapore — Suit No. 3940 of 1976]

Landlord and Tenant — Claim for declaration that applicants are tenants of premises — Premises rent controlled — Agreement for rent above controlled rent — Interim injunction.

The plaintiffs, a firm, applied for a declaration that they were the tenants of certain premises and an injunction against the defendants. It appeared that the tenancy agreement was entered into before the formation of the firm and that it provided for payment of rent above the controlled rent.

Held: (1) there was no privity of contract between the firm and the defendants and therefore the firm could not maintain the action or seek an injunction;

(2) the court could not lend its aid to enforce a tenancy agreement, where one of the terms to wit that relating to rent was unenforceable;

(3) as there was no real prospect of the plaintiffs succeeding in his claim for a permanent injunction the court did not have to go on to consider whether the balance of convenience lay in granting or refusing the interlocutory relief sought.

Case referred to:-

(1) *American Cynamid* v. *Ethicon Ltd.* [1975] 2 W.L.R. 316, H.L.

CIVIL SUIT.

Tony Lee for the plaintiff.

Khor Thian Beng for the defendants.

Rajah J.: In this matter the plaintiffs, Tomlinson Antique House (a firm) by virtue of a writ issued on December 6, 1976 seek: —

(i) a declaration that they are the tenants entitled to possession of Nos. 3, 5 & 7 (except the ground floor of No. 5) Tomlinson Road, and

(ii) an injunction in the usual terms to restrain the defendants from doing certain acts enumerated in the writ.

On an *ex parte* application supported by an affidavit by one Tan Hor Teng alias Tan Tien Chi, one of the two partners in the firm, and heard on December 6, 1976 the plaintiffs obtained an interim injunction until after the hearing of a motion returnable on the 14th day of January 1977 or until further order. On the 14th day of January the motion was adjourned for two weeks and the interim injunction was extended by consent for a further two weeks. The statement of claim was filed by the plaintiffs on January 26. The motion which came up before the court on January 28 was adjourned for hearing to a date to be fixed by the Registrar and the interim injunction was to continue until further order. Accordingly the motion now comes up for hearing.

It is clear from the affidavits filed by Tan Hor Teng and paragraphs 1 and 2 of the statement of claim that the facts at best for the plaintiffs is that the tenancy agreement, if any, was entered into between Tan Tien Chor and the 1st defendant, part owner of the premises in dispute. The firm did not come into existence until November 15, 1976 (Certificate of Business Registration). This being so the whole action is misconceived as the plaintiff firm cannot be the proper party